92-352

No. _____

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1991

JASON W. NOVAK

Petitioner,

vs.

ANDERSEN CORPORATION, a Minnesota corporation, and ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,
and

G.A. HOEL, JOHN VICTOR JENSEN, M.O. JOHNSON, L.W. KEDROWSKI, H.C. MEISSNER, G. SCHNEIDER, W.A. WELLMAN, individually and as Trustees, Plan Administrators and Committee Members of the ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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LISTING OF ADDITIONAL PARTIES

and

John Doe and Richard Roe and other Trustees, Plan Administrators and the Committee Members of the Andersen Corporation Employee Stock Ownership Plan and Trust, whose identities are unknown.

Defendants

QUESTION PRESENTED

I. Whether monetary damages are considered "other appropriate equitable relief" within the meaning of ERISA Section 502(a) (3)?

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In the

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JASON W. NOVAK
Petitioner,
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ANDERSEN CORPORATION, a Minnesota corporation, and ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,
and

G.A. HOEL, JOHN VICTOR JENSEN, M.O. JOHNSON, L.W. KEDROWSKI, H.C. MEISSNER, G. SCHNEIDER, W.A. WELLMAN, individually and as Trustees, Plan Administrators and Committee Members of the ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Jason W. Novak, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

PARTIES TO THE PROCEEDING BELOW

Jason W. Novak

Andersen Corporation, a Minnesota corporation

Andersen Corporation Employee Stock Ownership Plan and Trust

G.A. Hoel

John Victor Jensen

M.O. Johnson

L.W. Kedrowski

H.C. Meissner

G. Schneider

W.A. Wellman

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court decision granting summary judgment for Respondents (Appendix A-1) was filed April 9, 1992.

The United States District Court's Order granting summary judgment to Respondents (Appendix A-11) was entered March 20, 1991.

The decision of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Petition for Rehearing (Appendix A-22) was filed May 29, 1992.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered on April 9, 1992. A Petition for rehearing was denied by the Court of Appeals on May 29, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1990).

STATUTES INVOLVED

This case involves Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1132 (a) (1990):

"§1132. Civil Enforcement.

(a) Persons enpowered to bring a civil action. A civil action may be brought —

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of

his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. §1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. §1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provisions of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c) (2) or (i) or (1).

STATEMENT OF THE CASE

Petitioner Jason Novak's action arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001, et. seq. ("ERISA"). Petitioner contends that Respondents breached their fiduciary duty to Petitioner to distribute the notice of roll-over option pursuant to Internal Revenue Code Section 402(f) as required by Section 3.9 of the Andersen Corporation Employee Stock Ownership Plan and Trust ("the Plan"). Petitioner's remedy arises under 29 U.S.C. Section 1132(a) (3) (ERISA Section 502(a) (3)). Respondents moved for summary judgment on several grounds. The District Court granted Respondents' motion for summary judgment holding that the damages sought by Petitioner were extra-contractual and that extra-contractual damages are not available under ERISA Section 502(a) (3). In thus

deciding, the District Court declined to follow the Sixth Circuit decision in *Warren v. Society Nat'l Bank,* 905 F. 2d 975 (6th Cir. 1990); *cert. denied* 111 S. Ct. 2256 (1991); and stated it was adopting the reasoning of the First, Fourth, Fifth, Seventh and Ninth Circuits, all of which had determined that extra-contractual damages are not available under ERISA Section 502(a) (3). Thereafter, Petitioner appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit, in a 2-1 decision, affirmed the District Court's decision holding that the damages sought by Petitioner are not "equitable relief" with in the meaning of the statute. Appendix at A-1. Petitioner's Petition for Rehearing was denied.

Novak was employed by Andersen Corporation ("Andersen") until June 26, 1987 when he voluntarily terminated his employment. At that time, Novak elected to cash out his accumulated benefits in the Plan. Pursuant to his request, Novak received a single sum distribution of $84,637.00 on June 29, 1987, and a $3,199.54 distribution to clear out his account on February 2, 1988. At the time of his receipt of the aforementioned Plan benefits, Novak was not provided with a written explanation of the "roll-over notice" pursuant to Internal Revenue Code Section 402(f) (a written explanation of the provisions under which his distribution would not be subject to tax if transferred to an eligible retirement plan within 60 days of the distribution.)

As a direct result of Respondents' failure to provide the roll-over notice, Novak failed to roll over his benefit distribution within the required 60 day period and thus sustained substantial tax liability and the loss of tax-free compounding of benefits.

On August 12, 1988, counsel for Novak sent a letter to Andersen raising the issue of the failure to provide the 60-day roll-over notice to Novak. By letter of August 30, 1988, the manager of Employee Benefits at Andersen acknowledged that the roll-over notice had not been given to Novak.

On May 9, 1989, counsel for Novak, sent another letter to Andersen setting forth the breaches of fiduciary duty and demanding damages in the amount of $56.912.00 from the

Plan committee and fiduciaries. By its letter of June 13, 1989, the Plan committee stated that it had considered Novak's demand and denied the claim. It interpreted the Plan provision as requiring distribution of ERISA-required reports only and not IRS required notices. Thereafter, Novak filed suit.

REASONS FOR GRANTING THE WRIT

This court should grant the writ sought by Petitioner Novak because the ruling of the United States Court of Appeals for the Eighth Circuit that money damages are not "other appropriate equitable relief" within the meaning of ERISA Section 502(a) (3) is in direct conflict with a decision of the United States Court of Appeals for the Sixth Circuit on the identical issue, i.e., *Warren v. Society Nat'l Bank,* 905 F. 2d 975 (1990), *cert. denied,* 111 S. Ct. 2256 (1991).

At the time Novak elected to cash-out his accumulated benefits in the Plan on June 28, 1987 and February 2, 1988, the Plan in Section 3.9 provided as follows:

> "3.9 *Reports, etc.* The Committee shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall file *and distribute* the same as so required. Copies of each such report, disclosure and filing shall be submitted to the employer and shall be filed as a part of the permanent records of the Committee." (Emphasis supplied).

This language is unambiguous. It requires the Committee to prepare and distribute *all* reports, disclosures and filings required by law. Internal Revenue Code Section 402(f) (26 U.S.C. Section 402(f)) requires the Plan administrator to provide:

> "a written explanation to the recipient (A) of the provision under which such distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution . . ."

Since this notice is required by law, the plain meaning of Plan Section 3.9 required that the notice be prepared and

distributed to Novak. The Respondents admitted both in their letter of August 30, 1988 and again in their Answer that no such notice pursuant to Code Section 402(f) was ever given to Novak.

The Committee members were clearly fiduciaries and at all times owed a fiduciary duty to Novak. Their failure to distribute the notice of roll-over option as required by Plan Section 3.9 was a violation of the express terms of the Plan, and thus a violation of their fiduciary duty to Novak.

Novak's remedy arises under ERISA Section 502(a) (3) which provides in pertinent part as follows:

> "A civil action may be brought . . . (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provisions of this title or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . ." *29 U.S.C. § 1132(a) (3).*

In the instant case, the Eighth Circuit upheld the District Court decision granting summary judgment to Respondents holding that damages sought by Novak are not "equitable relief" and are thus unavailable under 502(a) (3).

The Eighth Circuit decision relied in part on *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134, 87 L.Ed.2d 96, 105 S.Ct. 3085 (1985).

Since Novak's cause of action arises under ERISA Sections 404(a) and 502(a) (3), *Russell* does not act as a bar to Novak's cause of action. The Plaintiff in *Russell* brought her cause of action pursuant to ERISA Section 409(a) and Section 502(a) (2), which are entirely different Sections of the ERISA Statute.

Indeed, in *Russell,* this Court expressly reserved judgment as to whether any other provision of ERISA (including Section 502(a) (3)) authorizes recovery of extra-contractual damages. 473 U.S. 139, n. 5.

In fact, Mr. Justice Brennan, in his concurring opinion, stated:

> "Section 502(a) (3) authorizes the award of 'appropriate

equitable relief' directly to a participant or beneficiary to 'redress' 'any act or practice which violates any provision of this title or the terms of the plan'. This section and section 404(a)'s fiduciary duty standards both appear in Title I, which is entitled 'PROTECTION OF EMPLOYEE BENEFIT RIGHTS.' A beneficiary, therefore, may obtain 'appropriate equitable relief' whenever an administrator breaches his fiduciary duties set forth in Section 404(a)." 473 U.S. at 154.

Novak is suing under Section 502(a) (3) and 404(a) (1) (D). Unlike 409(a) which the Plaintiff relied on in *Russell,* there is no language in 404(a) which suggests that remedies be limited to the plan itself.

The damages sustained by Novak resulted directly and proximately from the Respondents' failure to distribute the notice of roll-over option as required by Plan Section 3.9 and Internal Revenue Code Section 402(f). Not only did Novak suffer immediate loss through taxation, he also lost the income that could have been earned on these funds and the benefit of further accumulation of income on a tax deferred basis. These consequences were both foreseeable and reasonably certain to occur in the event Respondents failed to provide Novak with the notice of roll-over option. The amount of damages are reasonably certain and can be precisely calculated. They are not subject to other more subjective elements as are damages for emotional distress or punitive damages. They are *contractual* damages, not extra-contractual damages.

The Eighth Circuit's opinion held that there is no distinction between "contractual" or "extra-contractual" damages and that compensatory (monetary) damages are "legal" not "equitable" relief.

The Eighth Circuit attempted to determine what Congress meant when it allowed "other appropriate equitable relief". The Eighth Circuit stated that it must first look to the Statute itself (ERISA Section 502(a)). The Eighth Circuit stated that Section 502(a) is:

". . . the only section in the ERISA scheme which

provides for enforcement of an ERISA plan and relief to its beneficiaries. Nowhere does it allow damages which are reasonably foreseeable from a breach of the plan, as would generally be available in a legal action for breach of contract. Nor does Section 502(a) (3) expressly say anything about the recovery of compensatory or punitive damages. Absent some specific indication by Congress that it intended to offer a form of relief not explicitly provided for by the governing provisions, we cannot conclude that the statute itself affords Novak the relief he is requesting. And we find nothing in the statutory language to persuade us to interpret 'other appropriate equitable relief' to mean anything other than what it ususally means - declaratory or injunctive relief."

The Eighth Circuit's analysis of "other appropriate equitable relief" is much too narrow and is in direct conflict with a decision of the Sixth Circuit Court of Appeals.

In *Warren v. Society Nat'l Bank,* 905 F. 2d 975 (6th Cir. 1990); *cert denied* 111 S. Ct. 2256 (1991), the Sixth Circuit Court of Appeals examined a claim for monetary damages under 502(a) (3) and rendered a decision directly in conflict with the Eighth Circuit in this case. The *Warren* case is factually similar to the instant case. In that case, Dr. Warren requested, pursuant to the terms of the Plan, that his qualified plan fiduciary complete a tax-free roll-over of this accounts under the Plan into an IRA. The fiduciary did not follow the terms of the Plan and Dr. Warren was directly injured by failure of a fiduciary to follow the terms of the Plan.

The Sixth Circuit in *Warren* also examined the term "other appropriate equitable relief" under ERISA Section 502(a) (3):

"The term 'other appropriate equitable relief' implies a broad range of remedies. We adhere to the principle 'endorsed regularly by the federal judiciary,' that 'when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals.' *Petrolera Caribe, Inc. v. Arco*

Caribbean, Inc., 754 F. 2d 404, 428 (1st Cir. 1985) (footnote omitted). One of the important goals of ERISA is to make certain that participants and beneficiaries not be deprived of the full value of their plan benefits by a fiduciary's breach of contract." *Warren* at 982.

In determining whether the damages sought by Dr. Warren constituted "other appropriate equitable relief," the Sixth Circuit found Justice Brennan's concurring opinion in *Russell,* to be instructive.

In that regard, the Sixth Circuit stated:

"Justice Brennan stated that a beneficiary may seek 'other appropriate equitable relief' when an administrator breaches the fiduciary duties set forth in Section 404(a). See *Russell,* 473 U.S. at 154, 105 S. Ct. at 3096. Given that Congress intended to incorporate the fiduciary standards of trust law into ERISA, it is proper to apply 'black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits'. *Id.* at 152-53, 105 S. Ct. at 3095-96 (footnote omitted). Under the law of trusts, 'a beneficiary is entitled to a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust'. See *Id.* at 157 n. 16, 105 S. Ct. at 3098 n. 16. (quoting Restatement (Second) of Trusts Section 205, and Comment a (1959)). And 'other appropriate equitable relief' under Section 502(a)(3), for breach of fiduciary duties set forth in Section 404(a), includes the provision of monetary damages. *Id.* at 154 n. 10, 105 S. Ct. at 3096 n. 10."

* * *

"We believe Justice Brennan's conclusion is correct that under the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages. See *Russell,* 473 U.S. at 154 n. 10, 157 n. 16, 105 S. Ct. at 3096 n. 10, 3098 n. 16. Our position is supported

by the decisions of other courts of appeals finding that equitable relief includes monetary damages where required to afford complete relief. It is the historic purpose of equity to secure complete justice, and courts may adjust their remedies so as to grant the necessary relief. *Walters v. Marathon Oil Co.,* 642 F. 2d 1098, 1100 (7th Cir. 1981); *United States v. Martinson,* 809 F. 2d 1364, 1367 (9th Cir. 1987). Equitable relief may include monetary damages if necessary to do complete justice. *Walters,* 642 F. 2d at 1100; *Goldberg v. Medtronic, Inc.* 686 F. 2d 1219, 1229 (7th Cir. 1982)."

The *Warren* Court went on to distinguish may of the other circuit court cases which have held that 502(a) (3) does not provide for extra-contractual damages. In many of those cases, the damages sought were different in nature from the contractually based damages sought by Dr. Warren. *Warren* at 980, 982. Dr. Warren's case was contractual in nature, as is Novak's. The Sixth Circuit held that monetary relief was appropriate under 502(a) (3) in that situation and remanded the case to determine the merits of the facts presented by Dr. Warren.

This Court denied the Plan Fiduciary's Petition for Certiorari inthe *Warren* case.

Additionally, in *Warren,* this Court requested that the Solicitor General of the United States file an amicus brief stating the government's position on granting certiorari. The Solicitor General filed an amicus brief in opposition to this Court's granting certiorari to the Defendants in the *Warren* case. The Solicitor General believed that the damages claimed by Dr. Warren were contractual in nature rather that extra-contractual and that there was literally no conflict between the Sixth Circuit's decision in *Warren* and the First, Fourth, Fifth, Seventh and Ninth Circuits which had all held that extra-contractual damages are not available to claimants under ERISA Section 502(a) (3).

The Solicitor General, setting forth the position of the United States Government, stated in its amicus brief in the *Warren* case:

"In our view, the Court of Appeals correctly decided that Section 502(a) (3) authorizes federal courts to award make-whole relief to participants and beneficiaries for foreseeable losses that result directly from the breach of the terms a plan or from a violation of one of ERISA's substantive requirements. Such authority, we believe, is embraced within the power to grant 'other appropriate equitable relief' because that phrase is not limited to injunctions and declaratory judgments; rather it extends to the range of remedies developed by courts of equity in the enforcement and administration of trusts. And embraced within these remedies are monetary damages arising from breaches by fiduciaries of their contractual commitments.

"That conclusion is not inconsistent with this Court's decision in *Russell* and does not conflict with the decisions of the Courts of Appeals that have held unavailable under Section 502(a) (3) types of damages not normally regarded as flowing directly from a breach of a fiduciary obligation or the terms of an employee benefit plan, e.g., punitive damages awards, awards for emotional distress, and awards for certain other forms of extra-contractual damages. Further review by this Court is therefore not warranted."

The effort of the Eighth Circuit in this case to try to factually distinguish Novak's claim from the Plaintiff's claim in *Warren* is also erroneous. The Eighth Circuit's statement that the beneficiary in *Warren* was denied an actual benefit to which he was entitled under the Plan, and that in the instant case Novak received all of the benefits under the Plan, clearly demonstrates its misunderstanding of the fundamental issues herein.

In *Warren,* Dr. Warren received a distribution of all of the benefits he had coming under the Plan. They simply weren't rolled over into another qualified plan within the same calendar year as the Plan provided, and as he

requested of the fiduciaries. As a result of this breach by the fiduciary, Dr. Warren suffered additional tax and the loss of tax-free compounding of the benefits. That is the identical issue and the identical damage claim presented by Novak in this case.

Both cases involve a fiduciary's failure to act in accordance with the plan's terms. Both cases involve loss of the opportunity to maintain retirement funds in a tax-free environment because of the failure of the fiduciaries to carefully administer the provisions of their plans relating to roll-overs.

All of the arguments set forth above with regard to the *Warren* case, and all of the arguments put forth by the Solicitor General in its amicus brief opposing the grant of certiorari to review the Sixth Circuit's decision in *Warren* are equally applicable to the facts of the instant case. The damages claimed by Novak are precisely the same type of damages claimed by Dr. Warren. They are clearly contractually based damages and under ERISA Section 502(a) (3) with its underpinnings of traditional contract and trust common law principles, Novak should be allowed to pursue a remedy that will make him whole. The remedy sought by Novak is in futherance of the underlying purposes of ERISA.

Petitioner submits that the decision of the Sixth Circuit on this issue was correct and the decision of the Eighth Circuit in the instant case was erroneous.

Finally, it is time for this Court to address and resolve once and for all, the issue that was left expressly reserved in the *Russell* decision, i.e., whether any other provision of ERISA (including Section 502(a) (3)) authorizes recovery of the damages sought here. *Russell,* 473 U.S. 139, n. 5.

For the reasons set forth above, a Writ of Certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX

I. Decision of the United States Court of Appeals for the Eighth Circuit affirming the District Court Decision granting Summary Judgment for the Respondents, dated April 9, 1992 ..... A-1

II. Order of the United States District Court granting Respondents' Motion for Summary Judgment, filed March 20, 1991 ..... A-11

III. Order of the United States Court of Appeals for the Eighth Circuit denying Petition for Rehearing, dated May 29, 1992 ..... A-22

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-1957MN

Jason W. Novak, Appellant, v. Andersen Corporation, a Minnesota corporation; Andersen Corporation Employee Stock Ownership Plan and Trust; G.A. Hoel, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Stock Ownership Plan and Trust; John Victor Jensen, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Employee Stock Ownership Plan and Trust; M.O. Johnson, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Employee Stock Ownership Plan and Trust; L.W. Kedrowski, individually, and as Trustee, Plan Administrator and Committee Member of the Andersen Corporation Employee Stock Ownership Plan and Trust; H.C. Meissner, individually and as	*	**On Appeal From The United States District Court for the District of Minnesota**

Trustee, Plan Administrator and *
Committee Member of the *
Andersen Corporation Employee *
Stock Ownership Plan and Trust; *
G. Schneider, individually, and *
as Trustee, Plan Administrator *
and Committee Member of the *
Andersen Corporation Employee *
Stock Ownership Plan and *
Trust; W.A. Wellman, *
individually, and as Trustee, *
Plan Administrator and *
Committee Member of the *
Andersen Corporation Employee *
Stock Ownership Plan and Trust; *
John Doe; Richard Roe; Other *
Trustees; Plan Administrators *
and the Committee Members of *
the Andersen Corporation *
Employee Stock Ownership Plan *
and Trust, whose identities are *
unknown, *
Appellees. *

Submitted: November 15, 1991
Filed: April 9, 1992

Before LAY,* Chief Judge, ARNOLD,** Circuit Judge, and STUART, Senior District Judge.***

---

*The Hon. Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

**The Hon. Richard S. Arnold became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

***The Hon. William C. Stuart, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

ARNOLD, Circuit Judge.

This is a case brought under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq..,* by the beneficiary of a qualified ERISA plan to recover damages for his former employer's alleged breach of its fiduciary duty under that plan. The District Court[1] granted summary judgment for the defendants, holding that the damages requested by the plaintiff were extra-contractual damages, and that extra-contractual damages are not available under ERISA. We hold that the damages sought by plaintiff in this case are not "equitable relief" within the meaning of the statute, and we therefore affirm.

I.

Jason W. Novak was employed by Andersen Corporation until June 26, 1987, when he quit and elected to cash out his accumulated benefits in the Andersen Corporation Employee Stock Ownership Plan (the Plan), a qualified ERISA plan. He received a distribution of $84,637 on June 29, 1987, and a final distribution of $3,199.54 on February 2, 1988. Neither Andersen Corporation nor the Plan administrators gave Novak written notice of the "roll-over option," as required by Internal Revenue Code § 402(f), upon either of the distributions. The roll-over notice explains the procedures under which Novak's distribution would not have been immediately subject to tax if transferred to an eligible retirement plan within sixty days of the distribution. Novak did not transfer his distribution to an eligible retirement plan and was therefore taxed on the entire distribution.

On August 12, 1988, and again on May 9, 1989, Novak's counsel sent a letter to Andersen Corporation regarding its failure to provide the notice alleged by Novak to be required under the Plan. Novak points to paragraph 3.9 of the Plan, which states that "[t]he committee shall prepare, or cause to be prepared, such reports, disclosures and

[1] The Hon. David S. Doty, United States District Judge for the District of Minnesota.

other filings as are required by law and shall . . . distribute the same as so required." Novak claimed in the letters, and continues to claim here, that the roll-over notice is a disclosure "required by law" and, consequently, it should have been sent to him. Novak demanded damages, alleging that the committee's failure to give him the notice was a breach of its fiduciary duty. On June 13, 1989, the Plan committee stated that it had considered Novak's demand and denied the claim. The committee interpreted the provision as requiring distribution of only ERISA-required reports and not IRS-required notices. A week later, Novak filed suit.

II.

The parties agree that the Plan administrators did not give written notice to Novak as required by section 402(f) of the Internal Revenue Code. Furthermore, we will assume without deciding that this failure to give notice was a breach of the Plan. The only issue, then, is whether the alleged breach is remediable under ERISA.

Novak's remedy, if he has one, arises under 29 U.S.C. § 1132(a) (3) (ERISA § 502(a) (3)), which states:

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought –
>
> (1) . . .
>
> (2) . . .
>
> (3) By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

ERISA also provides a legal remedy, which allows a beneficiary to recover monetary damages for benefits owed under the Plan. The Plan here does not provide, and Novak does not argue, that compensation for tax losses caused by the Plan administrator's failure to give a roll-over notice is one of those benefits. In fact, Novak

concedes that he received all benefits to which he was entitled under the Plan. He claims he is not seeking legal relief at all, but equitable relief under § 502(a) (3) (B), and that the only "appropriate equitable relief" is monetary damages. We do not disagree with Novak's assertion that monetary damages may indeed be the only appropriate relief in this case. We do disagree, however, with his proposition that an award of monetary damages is equitable relief under ERISA.

Novak rests his argument on the distinction between contractual damages and extra-contractual damages. He claims that his damages are contractual damages and fit within § 502(a) (3) under "other appropriate equitable relief." The relevance of the distinction between contractual and extra-contractual for purposes of this particular section of ERISA escapes us. Both are monetary damages; both are traditionally legal, not equitable, relief. The fundamental issue, then, is not whether, as Novak claims, the damages are contractual or extra-contractual, but rather whether these monetary damages qualify as "other appropriate equitable relief."

No one disputes that ERISA allows a beneficiary such as Novak to get "contractual" damages – i.e., funds to which he is entitled under the Plan – under a different ERISA provision. See 29 U.S.C. § 1132(a) (1) (B) (ERISA § 502(a) (1) (B)). Novak is not claiming damages under this provision, however. The ERISA provision Novak invokes entitles him, as a beneficiary, to equitable relief, i.e., forcing a delinquent plan administrator to perform his duties under the plan or even, if warranted, imposing a constructive trust on the plan's assets. It does not, however, entitle him to force a delinquent plan administrator to pay monetary damages to compensate Novak for injuries suffered as a result of the administrator's alleged breach of the plan, whether he calls those damages "contractual" or "extra-contractual." This is true regardless of the fact that Novak could possibly get such damages in a non-ERISA breach-of-contract action.

III.

To determine what Congress meant when it allowed "other appropriate equitable relief," we look first to the statute itself.[2] ERISA § 502(a) is the only section in the ERISA scheme which provides for enforcement of an ERISA plan and relief to its beneficiaries. Nowhere does it allow damages which are reasonably foreseeable from a breach of the plan, as would generally be available in a legal action for breach of contract. Nor does § 502(a) (3) expressly say anything about the recovery of compensatory or punitive damages. Absent some specific indication by Congress that it intended to offer a form of relief not explicitly provided for by the governing provisions, we cannot conclude that the statute itself affords Novak the relief he is requesting. And we find nothing in the statutory language to persuade us to interpret "other

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[2] **(a) Persons empowered to bring a civil action**

A civil action may be brought –

(1) By a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or be a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant[ ] or beneficiary, for appropriate relief in the case of a violation of [section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

29 U.S.C. § 1132(a) (ERISA § 502(a)).

appropriate equitable relief" to mean anything other than what it usually means -- declaratory or injunctive relief.

An examination of the statute's legislative history further compels the conclusion that the damages claimed by Novak are unavailable. The Senate Finance Committee report on ERISA defined "appropriate equitable relief" as follows:

> Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries. Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary or participants or beneficiaries if he has violated any of the specified fiduciary obligations .... It is expected that a fiduciary ... may be removed for repeated or substantial violations of his responsibilities, and that upon removal the court may, in its discretion, appoint someone to serve until a fiduciary is properly chosen in accordance with the plan.

S. Rep. No. 383, 93d Cong., 2d Sess. 105-06, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4989. This passage lists the traditional equitable remedies of injunctive and declaratory relief and imposition of a contructive trust. We are not inclined to legislate by adding monetary damages to this already complete list.

Finally, although it did not squarely address the issue before us, the Supreme Court in *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985), held that 29 U.S.C. § 1109(a) (ERISA § 409(a)) allowing "such other equitable or remedial relief as the court may deem appropriate" did not allow a court to award extra-contractual damages to a beneficiary. Extra-contractual damages included damages which compensated the injured party for losses and injuries causes by a breach of the administrator's fiduciary duties. See 473 U.S. at 138. The Court explained as follows:

> [t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertant omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 361 (1980).

473 U.S. at 146. While *Russell* interpreted ERISA § 409(a) and not § 502(a) (3) (B), we find its analysis persuasive in interpreting "equitable relief" under § 502(a) (3) (B).

Novak points to a Sixth Circuit case, *Warren v. Society National Bank,* 905 F.2d 975 (1990), *cert. denied,* 111 S. Ct. 2256 (1991), to support his claim that his damages are contractual and, hence, recoverable. *Warren* held that certain damages claimed by a beneficiary of an ERISA plan were "contractual" – as opposed to extra-contractual like those in *Russell* – and were recoverable under § 502(a) (3) (B) as "other appropriate equitable relief." Novak argues that his situation is factually similar to the plaintiff's situation in *Warren* and urges us to adopt its reasoning.

First, we decline to adopt the reasoning of the Sixth Circuit on this issue. As we stated earlier, whether Novak's damages are contractual or extra-contractual is irrelevant to our decision. Both are monetary damages; both are traditionally legal, not equitable, relief. We disagree with the Sixth Circuit that the fact that the damages are "contractual" somehow makes them an equitable remedy. We agree with the dissent that § 502(a) (3) (B) uses the word "redress," and that "redress" means "to compensate." Undeniably, contractual damages do "redress" the injury, just as all remedies by definition "redress" an injury. But § 502(a) (3) (B) allows only

"appropriate equitable relief . . . to redress such violations." Damages are damages, and an award of damages is a legal, not an equitable, remedy.

Furthermore, even if we were inclined to follow *Warren* and award damages under § 502(a) (3) (B) in some situations, this would not be one of those situations. In *Warren* the beneficiary claimed he was denied one of the specific benefits under the plan. That is, the plan gave its beneficiaries several options under which they could withdraw their share of the plan assets. The option the beneficiary in *Warren* chose was a single-sum distribution. The plan administrator failed to follow the beneficiary's instructions and make a single-sum distribution, causing the damages claimed. Therefore, the beneficiary in *Warren* was denied an actual benefit he was entitled to under the plan. Novak, however, received all of the benefits to which he was entitled under the Plan. He claims that the administrators committed a breach of their fiduciary duty by failing to give notice of the roll-over option. We see a consequential difference between an administrator's failing to provide a benefit under the plan and violating a fiduciary duty.

Affirmed.

STUART, Senior District Judge, dissenting.

The majority holds that the damages sought by plaintiff in this case are not "equitable relief" within the meaning of the statute. Because I believe that the statute gives the courts authority to decree such compensation and that the *Russell* case is distinguishable on both factual and legal grounds, I dissent.

I would adopt the reasoning of Senior Circuit Judge Lively expressed in *Warren v. Society National Bank,* 905 F.2d 975, 978-983 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 2256 (1991). *See also Russell,* 473 U.S. at 148-158 (Brennan, J., concurring). In context, the phrase "other appropriate equitable relief . . . to redress such violations" should be construed to authorize courts to fashion remedies for existing rights created by ERISA or plan provisions. The

form of remedy is to be shaped generally by reference to equity jurisprudence, which permits decrees for the payment of money. *See Warren,* 905 F.2d at 981-82. In particular, however, the use of the word "redress" emphasizes the authority of the court to order compensation. "Redress" is defined as "to set (a wrong) right: REMEDY *** to make up for: COMPENSATE ***." *Webster's Third New Int'l Dictionary* 1904 (1971). *See also Black's Law Dictionary* 1150 (5th Ed. 1979) ("Satisfaction for an injury or damages sustained. Damages or equitable relief."). Accordingly, I would hold that the courts have authority to order the compensation sought here as "other appropriate equitable relief" under § 1132 (a) (3) (B) (i).

This holding would not conflict with other court of appeal's holdings. They involve claims for punitive damages, emotional distress or other clearly extracontractual damages. The claim here is that failure to give notice of the rollover provision of the IRS violated the plan provision to give notices "required by law" and resulted in additional income tax. I consider this a loss alleged to have been caused directly by breach of contract.

On the other hand, the majority's holding creates a direct conflict with the decision of the Sixth Circuit in *Warren. See Warren,* 905 F.2d at 982. Given that the opinion of the court in *Russell* did not address the issue, *see* 472 U.S. at 139 n.5, I would follow the guiding light given by Justice Brennan's concurrence and Judge Lively's opinion in *Warren* and reverse the decision of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States District Court

District of Minnesota

Fourth Division

Jason W. Novak,
Plaintiff,

v.

Andersen Corporation, a Minnesota corporation, and Andersen Corporation Employee Stock Ownership Plan and Trust,

and

G. A. Hoel, John Victor Jensen, M. O. Johnson, L. W. Kedrowski, H. C. Meissner, G. Schneider, W. A. Wellman, individually and as Trustees, Plan administrators and Committee Members of the Andersen Corporation Employee Stock Ownership Plan and Trust,

and

John Doe and Richard Roe and other Trustees, Plan Administrators and the Committee Members of the Andersen Corporation Employee Stock Ownership Plan and Trust, whose identities are unknown,
Defendants.

Civil No. 4-90-458
4-90-537

ORDER

Mathew B. Newman, Esq., 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415 and David D. Himlie, Esq., and Dederick & Himlie, 5200 Willson Road, Suite 405, Edina, MN 55424-1332, counsel for plaintiff.

Edward M. Laine, Esq., Paul W. Iverson, Esq. and Oppenheimer, Wolff & Donnelly, 1700 First Bank Building, St. Paul, MN 55101, counsel for defendants.

FILED MAR 20 1991
JUDGMENT
ENTERED MAR 20 1991

This matter is before the court on defendants' motion for summary judgment. For the reasons stated herein, the defendants' motion will be granted.

FACTS

Plaintiff Jason W. Novak was employed by defendant Andersen Corporation ("Andersen") until June 26, 1987, when he voluntarily terminated his employment. At the time he concluded his employment with Andersen, Novak elected to cash out his accumulated benefits in the Andersen Corporation Employee Stock Ownership Plan ("the Plan"). As a result of this decision, plaintiff received a single sum distribution of $84,637 on June 29, 1987. On February 2, 1988, plaintiff received a final distribution of $3,199.54 which effectively cleared out his account in the Plan.

Neither at the time that plaintiff received his single sum distribution nor at the time when his account was cleared out did plaintiff receive a written explanation of the "roll-over notice" required by Internal Revenue Code § 402(f). The roll-over notice explains the procedures under which Novak's distribution would not have been subject to tax if transferred to an eligible retirement plan within 60 days

of the distribution. On August 12, 1988, plaintiff's counsel sent a letter to Andersen regarding Andersen's failure to provide the roll-over notice to plaintiff. John Johnson, Andersen's manager of employee benefits, responded to the inquiry in a letter dated August 30, 1988. That letter stated:

> I am certainly aware of Code Section 402(f) and its requirements. However, our files do not contain any indication that Jason was given a written explanation of roll-over rules when he received the interim distribution from our plan on June 29, 1987 and I do not recall giving one to him. It is quite possible that I inadvertantly failed to give him the written explanation. However, I do remember discussing it with him and he did not want any withholding from either check. It did not appear that Mr. Novak had any intentions of rolling the distribution over to an IRA. I also remember going through a quick example of how the 10% penalty for distribution received prior to age 59½ are applied.

On May 9, 1989, plaintiff's counsel sent a letter to Andersen alleging that the fiduciaries of the Plan violated the terms of the Plan by failing to provide the roll-over notice. The letter demanded damages in the amount of $56,912 from the Plan committee and fiduciaries. The Andersen Corporation Employee Stock Ownership Plan Committee (the "Committee") responded to plaintiff's counsel's demand in a letter dated June 13, 1989. The Committee indicated that it had considered plaintiff's demand and denied the claim. The letter further stated that the Committee had interpreted the Plan provision on which plaintiff relied to require only distribution of ERISA-required reports and not IRS-required notices. The Committee indicated that Novak could appeal the Committee's decision within 45 days. No appeal was taken, however.

Plaintiff filed suit in this court on June 21, 1990, and the first defendant was served on June 27, 1990. The federal

suit alleges violation of the ERISA Plan and common law breach of contract and breach of fiduciary duty related to the same alleged actions. Also served on June 27, 1990, was plaintiff's state court complaint. The state court action alleges common law breach of contract and breach of fiduciary duty identical to the claims alleged in Counts II and III of the federal complaint. The state court action was later removed to this court. Both the federal action and the state action are now before this court and the defendants have moved for summary judgment in both cases.

DISCUSSION OF LAW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as the the verdict. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). Stated in the negative, summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248. In order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); Fed. R. Civ. P. 56(c). A fact is material only when its resolution affects the outcome of the case. *Anderson,* 477 U.S. at 248. On a motion for summary judgment, all evidence and inferences are to be viewed in a light most favorable to the nonmoving party. *Id.* at 250. The nonmoving party, however, may not rest upon mere

denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex,* 477 U.S. at 324. Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. *Id.* at 322-23. With this standard at hand, the court will consider the defendants' motion for summary judgment.

A. *Plaintiff's State Common Law Claims*

Counts II and III of plaintiff's federal complaint are identical to Counts I and II of plaintiff's complaint which was originally filed in state court. Both counts alleged state common law causes of action. At the pretrial conference held on this matter, plaintiff's counsel indicated that summary judgment is appropriate on the state common law claims. Accordingly, summary judgment will be entered in favor of defendants and against plaintiff on Counts II and III of Court File No. 4-90-458 and on both counts alleged in Court File No. 4-90-537. In light of this decision, the only issue the court need address in detail is whether defendants are entitled to summary judgment on Count I of Court File No. 4-90-458, plaintiff's ERISA claim.

B. *The ERISA Claim*

Plaintiff alleges that the Plan fiduciaries have breached their fiduciary duty to him by failing to provide the roll-over notice. Plaintiff contends that he is entitled to damages resulting from that breach. Defendants have moved for summary judgment on plaintiff's claim for damages resulting from an alleged breach of their duties under ERISA on three grounds. Defendants first contend that the Plan does not require the distribution of the roll-over notice as plaintiff alleges. Second, defendants contend that plaintiff failed to exhaust his administrative remedies before bringing this lawsuit. Finally, defendants argue that the damages plaintiff seeks are not available

under ERISA. The court will address each of these grounds for summary judgment in turn.

1. The Notice Requirement Under the Plan

Defendants contend that they are entitled to summary judgment on plaintiff's claim of breach of fiduciary duty because the Plan does not require distribution of the roll-over notice. In support of their position, defendants point to § 3.9 of the Plan which provides:

> *Reports, Etc.* The Committee shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall file and distribute the same as so required. Copies of each such report, disclosure and filing shall be submitted to the employer and shall be filed as a part of the permanent records of the Committee.

Defendants contend that the Committee has been granted discretion to interpret the Plan provisions. The defendants then cite *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), for the proposition that "where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." Defendants argue that because the Plan has conferred discretion upon the Committee to interpret the plan, the Committee's interpretation of the Plan can only be disturbed if it is arbitrary and capricious or an abuse of discretion. In support of this proprosition defendants cite *Redmond v. Burlington Northern R.R. Co. Pension Plan,* 821 F.2d 461 (8th Cir. 1987). Defendants contend that their letter to plaintiff dated June 13, 1989, revealed its interpretations of § 3.9 of the Plan. In defendants' view, their interpretation of the Plan's requirements regarding reports and disclosures was not arbitrary and capricious and thus may not be disturbed.

Plaintiff takes a different view. First, plaintiff argues that pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, summary judgment is inappropriate at this

time because discovery necessary to defeat defendants' motion is incomplete. Plaintiff raised this argument in his memorandum in opposition to defendants' motion for summary judgment and reiterated his request for additional discovery at the hearing on this matter. The court granted plaintiff's request and allowed additional limited discovery on the issue of the Plan administrator's good faith interpretation of the Plan. Pursuant to the court's authorization, plaintiff took the deposition of John Jensen, manager of employee benefits at Andersen and Leonard Kedrowski, secretary to the Plan Committee and a Plan Committee member. Information gained through this and other discovery have led the plaintiff to conclude that additional discovery is still needed to allow plaintiff to properly defend against defendants' motion for summary judgment on the issue of good faith interpretation of the Plan.

Among the issues plaintiff believes require additional discovery are the relationship between defendants' attorneys and the Committee's interpretation of the Plan. Plaintiff contends that defendants' attorneys were so inextricably bound up with interpretation of the Plan provisions that the defendants' attorneys are fiduciaries of the Plan. Plaintiff argues that because defendants' attorneys are fiduciaries of the Plan, the attorneys' work product is discoverable and the attorneys themselves may be deposed. Specifically, plaintiff requests the court to order defendants' attorneys to reveal the contents of a three-page memorandum that was prepared by defendants' counsel and forwarded to the Committee at its May 23, 1989, meeting.

The plaintiff's allegations concern the court. First, the court is concerned with the legal issues this case raises. An ERISA fiduciary's duty to provide the roll-over notice required by the Internal Revenue Code is an important legal issue and one that is apparently of much moment to the instant plaintiff. Second, the court is concerned about the factual allegations plaintiff has made. The

relationship and interaction between ERISA fiduciaries and their legal counsel is a sticky legal issue and particularly so in light of the factual allegations plaintiff has made in this case. Although the court is concerned about these issues and the allegations made in this matter, it need not reach these issues because defendants are entitled to summary judgment on an independent ground as discussed below.

2. Plaintiff's Failure to Exhaust Administrative Remedies

Defendants next contend that they are entitled to summary judgment on plaintiff's ERISA claim because plaintiff failed to exhaust his administrative remedies prior to bringing this lawsuit. Defendants contend that in a letter to plaintiff dated June 13, 1989, they informed plaintiff of his right to appeal the Committee's denial of his requested damages. Defendants also contend that the letter indicated that plaintiff had 45 days in which to take the appeal. Defendants argue that because no appeal was taken plaintiff has failed to satisfy the prerequisites to bringing this action and the action should be dismissed.

Plaintiff contends that filing an appeal was unnecessary for several reasons. Plaintiff argues that an appeal was unnecessary because any further Committee review of the Plan would have been meaningless. The court need not reach this issue and will not comment on the validity of either party's aguments because, as will be seen below, there is a separate and independent ground on which to grant defendants' motion for summary judgment.

3. The Availability of Extra-Contractual Damages under ERISA

Defendants argue that even if the failure to provide plaintiff will roll-over notice did constitute a breach of their fiduciary duty, and even if plaintiff's failure to appeal the Committee's decision within 45 days is not a bar to this action, they are still entitled to summary judgment because plaintiff seeks extra-contractual

monetary damages and such damages are not available under ERISA. In support of his claim for damages plaintiff relies on § 502(a) (3) of ERISA, which provides:

> [A civil action may be brought] by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the Plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter or the terms of the Plan.

29 U.S.C. § 1132(a) (3). Defendants contend that plaintiff's action cannot be sustained under § 502(a) (3) because that section authorizes "appropriate equitable relief" and plaintiff seeks compensatory damages. In short, defendants argue that because plaintiff seeks legal, not equitable, relief, his suit is not properly sustainable under § 502(a) (3).

Resolution of this issue requires the court to interpret the meaning of "appropriate equitable relief" as that phrase is used in § 502(a) (3). The United States Supreme Court has not directly addressed this issue. Several United States Circuit Courts of Appeals have addressed this issue, however. The First, Fourth, Fifth, Sixth, Seventh and Ninth Circuits have all addressed the issue. Of these courts, only the Sixth Circuit has found that extra-contractual damages are recoverable under § 502(a) (3). *Warren v. Society Nat'l Bank,* 905 F.2d 975 (6th Cir. 1990). All of the other circuit courts that have addressed the issue have found that extra-contractual damages are not available under § 502(a) (3). *Drinkwater v. Metropolitan Life Ins. Co.,* 846 F.2d 821 (1st Cir. 1988). *Powell v. Chesapeake & Potomac Tel. Co.,* 780 F.2d 419 (4th Cir. 1985), *cert. denied,* 476 U.S. 1170 (1986); *Sommers Drug Stores Co. v. Corrigan Enterprises,* 793 F.2d 1456 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987); *Kleinhans v. Lisle Saving Profit Sharing Trust,* 810 F.2d 618 (7th Cir. 1987); *Sokol v. Bernstein,* 803 F.2d 532 (9th Cir. 1986). *Cf. Dependahl v. Falstaff Brewing Corp.,* 653

F.2d 1208, 1216 (8th Cir. 1981) (holding that "as a matter of federal common law, an award of punitive damages is inappropriate to a claim of interference with employee benefit plans.").

These courts have examined the reasoning the United States Supreme Court contained in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134 (1985). In *Massachusetts Mutual,* the Supreme Court examined § 502(a) (2) and held that Congress had intended that actions pursuant to that section be on behalf the plan as a whole, rather than an individual beneficiary. The ultimate effect of the *Massachusetts Mutual* decision was to bar the recovery of extra-contractual damages in suits initiated under § 502(a) (2). Although the Supreme Court specifically reserved the question of the availability of extra-contractual damages under §502(a) (3), various circuit courts of appeals have examined the reasoning which underlies the *Massachusetts Mutual* decision and have found it equally applicable to § 502(a) (3).

The court has considered the issue and has concluded that the greater weight of authority favors construing the phrase "appropriate equitable relief" strictly. Consequently, the court declines to follow the Sixth Circuit decision in *Warren v. Society Nat'l Bank,* 905 F.2d 975 (6th Cir. 1990) and adopts the reasoning of the First, Fourth, Fifth, Seventh and Ninth Circuits as set forth in the cases cited above.

Count I of plaintiff's complaint seeks recovery of extra-contractual damages under § 502(a) (3) for breach of fiduciary duty. In light of the court's conclusion that extra-contractual damages are not available under that section, plaintiff's claim must fail. Accordingly, because there is no genuine issue of material fact with respect to the availability of plaintiff's requested relief, defendants are entitled to summary judgment on plaintiff's ERISA claim.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Defendants' motion for summary judgment on plaintiff's state common law claims pleaded in Counts II and III of Court File No. 4-90-458 and Counts I and II of Court File No. 4-90-537, is granted; and

2. Defendants' motion for summary judgment on plaintiff's ERISA claim is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 20, 1991

David S. Doty, Judge
United States District Court

United States Court of Appeals
For The Eighth Circuit

No. 91-1957MNMI

Jason W. Novak,	*	
Appellant,	*	
vs.	*	
	*	**Order Denying Petition**
Andersen Corporation,	*	**for Rehearing and Suggestion**
a Minnesota corporation,	*	**for Rehearing En Banc**
et al.,	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

Judge Magill took no part in the consideration or decision of this case.

May 29, 1992

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit